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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-377

DOW JONES & COMPANY, INC., *et al., Petitioners,*

v.

UNITED STATES POSTAL SERVICE, *Respondent.*

No. 79-378

MAGAZINE PUBLISHERS ASSOCIATION, INC.
and
TIME INCORPORATED, *Petitioners,*

v.

UNITED STATES POSTAL SERVICE, *Respondent.*

No. 79-379

AMERICAN BUSINESS PRESS, INC., *Petitioner,*

v.

UNITED STATES POSTAL SERVICE, *Respondent.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS

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October 26, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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BRIEF IN OPPOSITION FOR RESPONDENT NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS

Respondent National Association of Greeting Card Publishers respectfully requests that this Court deny the petitions for a writ of certiorari, seeking review of the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on June 8, 1979 in *National Association of Greeting Card Publishers* v. *United States Postal Service,* No. 78-1448 *et al.*

QUESTION PRESENTED

Whether the court in *NAGCP I* (1976) correctly determined that the decision of the Postal Rate Commission in that case was contrary to the plain language and legislative history of the Postal Reorganization Act because the Commission:

(a) refused to allocate Postal Service costs to the classes of mail causing them except for costs which were short run volume variable; and

(b) allocated more than fifty percent of Postal Service costs based on a highly subjective and unjust inverse elasticity methodology which disproportionately burdened first class mailers and others who are required by law to use the Postal Service?[1]

SUMMARY OF ARGUMENT

Petitioners are seeking review of the wrong case. The question presented was decided three years ago in *NAGCP I* (1976) and petitioners have offered no compelling reason for disturbing the settled law.

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[1] Petitioner American Business Press raises an issue concerning the constitutionality of the Postal Rate Commission's decision with respect to second class presort discounts. Respondent NAGCP takes no position on this issue.

The court, in *NAGCP I* (1976), correctly concluded that the Postal Reorganization Act required attribution of costs to particular classes of mail based on all reasonable inferences of cost causation. The court properly concluded that cost attribution could not be limited solely to those costs which were volume variable. Such a limitation is arbitrary and fails to attribute significant costs which are caused by particular classes of mail.

The court was also correct in refusing to allow allocation of costs, which could not be attributed to particular classes of mail, based on the "inverse elasticity rule." That rule excludes consideration of the statutory factors and has the effect of arbitrarily placing the bulk of the cost of operating the Postal System on first class mailers who have no alternative means of delivery. The purpose of the Act was to avoid such arbitrary and unfair burdens on the public. The Court of Appeals in *NAGCP I* (1976) did no more than give effect to the Postal Reorganization Act's prohibition against undue discrimination or preferences. 39 U.S.C. §§ 101(d), 403(c), 3621 (1976).

STATEMENT OF THE CASE

These petitions technically involve challenges to the validity of the decision of the United States Court of Appeals for the District of Columbia Circuit affirming an order of the Board of Governors of the United States Postal Service approving a recommended decision of the Postal Rate Commission which provided for increases in postal rates and fees. In fact, petitioners are seeking review of a different case.

A. NAGCP and Its Role as Sole Representative of the Citizen Mailer

Respondent National Association of Greeting Card Publishers (NAGCP) is made up of the producers of over 85 percent of all greeting cards sold in the United States. It has participated as an intervenor in every general postal ratemaking proceeding. Due to its interest in maintaining postal rates which will encourage the use of greeting cards, primarily by private citizens, its interests coincide with those of private citizen first class mailers. With the Officer of the Commission who supported the first class mailer before the Commission barred from any role in the appeal, NAGCP alone represents the interests of the citizen mailer.

B. Statutory Background

Under the Postal Reorganization Act of 1970 ("Act"), 84 Stat. 719 *et seq.*, 39 U.S.C. § 101 *et seq.* (1976), postal rate changes are initiated when the United States Postal Service ("Postal Service") petitions the five-member Postal Rate Commission ("Commission") for an increase. 39 U.S.C. § 3622(a). After an evidentiary hearing on the record, the Commission submits a recommended decision to the Board of Governors of the Postal Service ("Governors"). 39 U.S.C. § 3622(b). If adopted by the Governors, the decision is final, subject to judicial review under 39 U.S.C. § 3628.

In accordance with the policy provisions of the Act, rates must be set to provide sufficient revenues so that, when added to appropriations and other income, the Postal Service will break even. Within these guidelines, all postal costs must be apportioned on a fair and equitable basis among all classes of mailers with no undue

discrimination or preferences. 39 U.S.C. §§ 101(d), 403(c), 3621. In apportioning costs, the Commission is directed to consider several ratemaking factors, one of which is cost related. Section 3622(b)(3) of the Act establishes

> the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type.

That provision is at the center of this dispute.

C. Proceedings Under the Act

This case arises out of the fourth general ratemaking proceeding under the Act. All four ratemaking proceedings have been reviewed by the United States Court of Appeals for the District of Columbia Circuit.

Case I (1971)—From 6¢ to 8¢ For First Class

The first proceeding (Docket No. R71-1) commenced on February 1, 1971. Under the Postal Service's proposed rate design, only costs which varied proportionately with volume during the test year (49 percent of a total operating budget of approximately ten billion dollars) were attributed to those classes of mail which caused them. The Postal Service argued that short run volume variability was the only permissible manner of determining which costs were caused by each class of service. It further argued that any effort to allocate costs using other reasonable causation inferences was not authorized.

All other costs were allocated based on a single value of service concept. Using the so-called "inverse elas-

ticity rule," two middle-level Postal Service employees made subjective "estimates" of the elasticities of demand for each class of mail and allocated costs in inverse proportion to the relative elasticity of each class. The necessary and intended result of this method was to allocate a disproportionate amount of Postal Service costs to those classes of mail such as first class which are bound to the Postal Service by the private express statutes.[2] In other words, these costs were allocated on the basis of the age old principle of "whatever the traffic will bear." Substantial portions of the Postal Service's outlay for labor, *i.e.*, most carrier costs, as well as virtually all building, equipment and vehicle costs were allocated in this manner.[3]

The Commission's Chief Hearing Examiner approved the Postal Service request with some modifications on the grounds that it was a reasonable first effort and that the record permitted development of no alternative system. He concluded, however, that the Act requires allocation of costs to the service classes causing them to the fullest extent possible and that the Postal Service's cost allocation methods did not yet reflect the full cost burdens of each class imposed on the system.[4] The Commission took a less exacting view, but concurred with the Examiner's description of the fundamental problem, and the Governors adopted the Commission's decision.

[2] The private express statutes, 39 U.S.C. § 601 *et seq.*, impose severe restrictions on the private carriage of letters and other types of first class mail and guarantee the Postal Service a virtual monopoly on the delivery of such mail. Criminal penalties for violations of these statutes are set forth in 18 U.S.C. §§ 1693-1699.

[3] *See* Chief Examiner's Initial Decision, Docket No. R71-1 (February 3, 1972) at 47-48.

[4] *Id.* at 29.

On review, the Court of Appeals did not disturb the Commission's decision out of deference to its initial efforts under a novel regulatory scheme and based on assurances of improved costing methods in the future. *Association of American Publishers, Inc.* v. *Governors of the United States Postal Service*, 485 F.2d 768, 777 (D.C. Cir. 1973). In a unanimous concurring opinion, however, the Court agreed with the Chief Examiner's conclusion that the Postal Service's limited effort at allocating costs on a cost of service basis, although perhaps a reasonable first effort, produced a result which was probably inconsonant with Congressional intent:

> Its [Congress'] stated intent to purge the postal system of "politics" provides a strong indication that the Chief Examiner was correct when he suggested that discretionary or "reasonable" assignment of costs should apply only where Postal Service simply *could not* "attribute" costs.

Id. at 779. In commenting on the inverse elasticity rule, the court agreed with the Chief Examiner's conclusion:

> Distributing billions of dollars on the basis of thinly supported judgments is not an acceptable method. And it is an invitation to pressures which Congress sought to avoid.

Id. at 778.

Case II (1973)—From 8¢ to 10¢ For First Class

All petitioners in the case now before the Court participated in the second rate proceeding (Docket No. R74-1) which commenced on September 25, 1973. The Postal Service rate request, which employed the same

allocation methods used in the first case, allocated an even smaller percentage of budget requirements on a cost of service basis. This Postal Service rate proposal was rejected by the Administrative Law Judge who concluded that it was feasible to trace substantially more costs to the classes of mail causing them as was required by the Act. Using Postal Service data, he was able to allocate 70.6 percent of all costs on a cost of service basis. As a result, he recommended an 8.5¢ first class rate instead of the 10¢ proposed by the Postal Service.[5] The Commission, with one dissent, rejected the Chief Administrative Law Judge's recommended decision and reinstated with some modifications the methodology proposed by the Postal Service. The Governors adopted the Commission's decision. This decision attributed only costs which were volume variable and employed the inverse elasticity technique to allocate the balance of the costs.

NAGCP appealed this decision to the U.S. Court of Appeals for the District of Columbia Circuit. *National Association of Greeting Card Publishers* v. *United States Postal Service*, 569 F.2d 570 (D.C. Cir. 1976) ("NAGCP I (1976)"). Several of the petitioners in the instant case intervened in that appellate proceeding.[6] In *NAGCP I* (1976), the court held that the Act required Postal Service costs to be attributed to the greatest extent possible to the class of service which caused them and that limiting cost of service principles to costs which are short run volume variable was contrary to that requirement. The court found that the

[5] Chief Administrative Law Judge's Initial Decision on Postal Rate and Fee Increases, Docket No. R74-1 (May 28, 1975) at 12-13.

[6] These included American Business Press, Inc., National Newspaper Association, and Association of American Publishers, Inc.

inverse elasticity method of allocating costs based on subjective estimates of what the traffic will bear was similarly impermissible under the Act and unduly burdensome on first class mailers. The court did not, however, attempt to prescribe any specific cost allocation methodology as being most responsive to the underlying purposes of the Act. The court held that "to be acceptable, a methodology need only be reasoned, nonarbitrary and permissible under the statute." *Id.* at 591. A Postal Service request for a rehearing *en banc* was denied. No party sought this Court's review of the decision in *NAGCP I* (1976).

Case III (1975)—From 10¢ to 13¢ For First Class

The third proceeding (Docket No. R76-1) commenced on September 18, 1975, before a decision had been rendered in NAGCP I (1976). Dispensing with a hearing examiner, the Commission conducted all proceedings *en banc*. Its final decision was based on the same methodology as employed in prior ratemaking proceedings, and NAGCP appealed that decision. The appeal, which was pending when *NAGCP I* (1976) was decided, was dismissed for mootness when yet another rate proceeding commenced. *National Association of Greeting Card Publishers* v. *United States Postal Service*, No. 76-1611 (D.C. Cir. *dismissed per curiam* June 27, 1978) ("NAGCP II").

Case IV (1977)—From 13¢ to 15¢ For First Class

The fourth and latest proceeding (Docket No. R77-1) commenced on July 13, 1977. Consistent with the decision in *NAGCP I* (1976), the Postal Service filed a rate request which allocated 73.5 percent of all costs to the classes of mail service causing them. To allocate those

costs, the Postal Service relied on various reasonable inferences, including but not limited to direct volume variability. The remaining 26.5 percent of costs was allocated based on non-cost factors. The Commission adopted this proposal with only minor modifications, and the Governors again endorsed the recommended decision of the Commission.

Numerous parties, including respondent NAGCP, appealed from the Commission's action, complaining about various aspects of the decision, most of which are not at issue in this court. *National Association of Greeting Card Publishers* v. *United States Postal Service,* Case No. 78-1448 (D.C. Cir. 1979) ("NAGCP III (1979)"). The court below, after reviewing the history of proceedings under the Act and its rulings in prior cases, rejected each challenge to the Commission's decision, finding the Commission's approach reasoned, nonarbitrary and consistent with statutory intent. It therefore affirmed.

REASONS WHY THE WRIT SHOULD BE DENIED

I. This Case Presents No Important Question of Federal Law or Conflict with Decisions of This Court

Petitioners argue that the court below incorrectly decided an important question of federal law which this court should now settle. That question of law is whether the Act permits the Commission to ignore cost of service concepts except for those costs which are directly volume variable and to allocate all of the very substantial remaining costs based on the "inverse elasticity rule." This question of law is not squarely presented in *NAGCP III* (1979) and, in any event, does not warrant consideration by this Court.

A. Petitioners are seeking review of the decision in NAGCP I (1976), not NAGCP III (1979)

Petitioners are seeking review in the wrong case. Their "important question of law" is not directly presented by the decision in *NAGCP III* (1979); it was decided three years ago in *NAGCP I* (1976). In that case the court, following a thorough examination of the language of the Act, its legislative history and the 16,000 page Commission record, determined that both the plain reading of the statute and its legislative history compel the conclusion that the Commission is required to trace the cost consequences of providing each class of service and to allocate costs on that basis as far as reasonably possible.

In *NAGCP III* (1979), the court below was confronted with a different issue. There, the Commission had, in fact, allocated 74.5 percent of all Postal Service costs on the basis of cost of service principles. The court's review was limited to determining whether the particular methodologies selected by the Commission were reasoned, nonarbitrary and permissible under the Act. While the court did discuss some of the principles enunciated in *NAGCP I* (1976), it was in the context of determining whether the specific formulas adopted by the Commission for allocating costs to the classes causing them were supported in the record and permissible under the Act.

B. Petitioners present no special or important reasons requiring the exercise of the Court's discretionary jurisdiction

NAGCP III (1979) presents a poor vehicle for review of the decision in *NAGCP I* (1976). That decision was open to direct review, and no petitioner has sug-

gested any cogent reason why review was not sought.[7] Surely if the legal principle involved is as critical to the financial well-being of the Postal Service as argued by petitioners, certiorari would have been sought in *NAGCP I* (1976).

Petitioners nonetheless argue that the holding in *NAGCP I* (1976) threatens the solvency of the Postal Service. They contend that newspaper, magazine and book publishers, record distributors and others who are free to use alternative means of delivery because they are not covered by the private express statutes will cease using the mails if they are asked to pay rates which fully reflect the costs of providing service to them. This diversion of business, petitioners argue, will result in deficits for the Postal Service and eventually shift greater cost burdens to first class mailers, who by law have no alternative to the mails. NAGCP, which would have the most to lose if this occurred, does not agree.

Petitioner's dire predictions of financial havoc and insolvency resulting from the NAGCP I (1976) decision are baseless. In fact, the Postal Service recently announced that for the first time since 1945, it expects

[7] Three of the eight petitioners now seeking review of *NAGCP III* (1979) were intervenors in *NAGCP I* (1976) and thus clearly entitled to seek certiorari in that case. All other petitioners had participated in the Commission proceedings which culminated in *NAGCP I* (1976) but did not appear as parties in the appellate proceedings. Although a non-party generally does not have standing to file a petition for certiorari, the Court has allowed such a petition where the non-party is the real party in interest adversely affected by the decision. *See, e.g., Banks* v. *Chicago Grain Trimmers Assoc., Inc.*, 389 U.S. 813 (1967). None of these petitioners even attempted to apply for certiorari.

a revenue *surplus* which will total approximately $400 million in fiscal 1979.[8]

Moreover, the cost assignments challenged in this case involve only 7.14 percent of the Postal Service's total revenue requirement.[9] Almost 65 percent of total costs was attributed on the basis of volume variability, the methodology used by the Commission in prior rate cases. Twenty-eight percent of total costs (4.9 billion dollars) was allocated using non-cost factors and other considerations. Only the remaining seven percent was allocated using the methodologies challenged in *NAGCP III* (1979). Although the absolute dollar amounts are large because every Commission decision affects millions or even billions of dollars in postal revenue, that fact alone cannot justify this Court's consideration of this case. If large dollar amounts were enough, every Commission ratemaking decision would be appropriate for review.

The greater paradox in petitioner's reasoning is that it is *not* the first class mailers seeking review in this case. Petitioners are those very magazine publishers and record distributors who, we are told, might abandon the Postal Service if they are forced to bear their full share of costs. The only party to these proceedings representing the views of first class mailers is respondent NAGCP, which has consistently argued *for* the

[8] Speech by Postmaster General William F. Bolger before Postal Forum East, Niagara Falls, N.Y. (Oct. 16, 1979).

[9] While NAGCP does not agree that the cost assignments in the Commission Opinion were appropriate, NAGCP has not challenged them on appeal. In future proceedings, NAGCP will advocate more refined attribution.

result in *NAGCP I* (1976). One can only conclude that it is a lower postal rate for petitioners, not the viability of the Postal Service nor the predicted higher rates for first class which are actually at stake in this case. However, this court does not sit for the benefit of particular litigants. *Rice* v. *Sioux City Memorial Park Cemetary, Inc.*, 349 U.S. 70, 74 (1955).

II. NAGCP I (1976) Was Properly Decided

A. The court's interpretation of the Act was correct

The decision in *NAGCP I* (1976) was correct.[10] It focused on 39 U.S.C. § 3622, the section of the Act which sets forth the factors that the Commission must take into account in setting rates, and gave effect to subsection 3622(b)(3) which establishes

> the *requirement* that each class of mail or type of mail service bear the *direct and indirect* postal costs *attributable to* that class or type plus *that portion* of all other costs of the Postal Service reasonably *assignable* to such class or type (emphasis added).

The *NAGCP I* (1976) court concluded that only one interpretation of § 3622(b)(3) gives meaning to all its terms. The court found that the use of the word "requirement" (and its absence in all other ratemaking factors) implied preeminence of the cost of service concept conveyed in § 3622(b)(3). The phrase "direct and indirect . . . costs" necessarily suggested allocation of

[10] To date, the underlying principle of that decision has been espoused by three different panels of the D.C. Circuit (two of them unanimously) and twice by the Commission's Chief Hearing Examiner. Only the Commission itself has disagreed.

costs beyond those which are directly volume variable and implied some form of cost accounting analysis. The phrases "costs attributable to" and "assignable to" buttressed the implied use of cost accounting concepts. Reference to "that portion of all other costs" indicated that the drafters contemplated a residuum of costs—the remainder after the assignable portion is identified—to be allocated based on non-cost factors. *NAGCP I* (1976), 569 F.2d at 585-587.

The legislative history of the Act bolstered the court's reading of the statute. *NAGCP I* (1976), 569 F.2d at 587-89. A "central and express" aim of both Houses of Congress was to reduce the subjectivity and discretion inherent in the prior political ratemaking process.

> [If] postal rates and postal classification are going to be established on a basis of charging *whatever the traffic will bear* to a particular class of mail according to its ability to pay, what kind of an increase it got last time, or its "social acceptability," then Congress is clearly better qualified to make such judgments than the Postal Service or any expert commission. Such purely political judgments are the province of Congress.

S. Rep. No. 91-912, 91st Cong., 2d Sess. 11 (1970). (Emphasis added.)

Another principal feature of prior ratemaking procedures—one Congress clearly intended to eliminate—was the imposition of discriminatorily high rates on first class mailers, who were bound by law to the postal system. The problem was concisely epitomized by Senator McGee, sponsor of the Senate draft of the legislation:

> Most of the money in the postal system comes from first class mail. A 100% increase in the rate

> for all second class mail would not produce as much revenue as a 5% increase in the first class rate. The temptation to resolve the financial problems of the post office by charging the lion's share of all operational costs to first class is strong; that's where the big money is. The necessity for preventing the imposition upon the only class of mail which the general public uses is one of the reasons why the Postal Rate Commission should be independent of operating management.

S. Rep. No. 91-912, 91st Cong., 2d Sess. 13 (1970).

The Senate bills (S. 3613 and S. 3842) specifically forbade undue discrimination and would have abolished most rate preferences. All of the mail classes were to bear their costs of service, with the increases for some formerly preferred classes to be phased in over five and ten year periods to cushion the change to cost based rates.[11] The Committee version of the bill directed the Commission to set rates reflecting the "operating costs, the amount of overhead, and other institutional costs of the postal service properly assignable to each class of mail." S. 3842, 91st Cong., 2d Sess. § 3704(b).

In contrast, however, the House bill provided for special preferences for certain second, third, and fourth class mailers. H.R. 17070, 91st Cong., 2d Sess. (1970) at § 1202(e). With respect to distribution of postal costs, the House Bill provided merely that each class of service would bear "those costs demonstrably related to it." *Id.* at § 1201(c). When the House and Senate conferees met in conference, the Senate conferees agreed to write the rate preferences of 39 U.S.C. § 3626 into the Act, and the House conferees in turn

[11] *See* S. 3613, 91st Cong., 2d Sess. (1970) at § 3703(e); S. 3842, 91st Cong., 2d Sess. (1970) at § 3704(i).

accepted a cost standard requiring attribution of costs as far as reasonably possible.

In *NAGCP I* (1976), the court found that the Commission decision before it effectively perpetuated prior practice. Under the guise of the "inverse elasticity rule," the Commission had approved the Postal Service allocation of 52.5 percent of its operating budget on the basis of the unstructured and virtually unreviewable judgment of two men as to what the traffic would bear. The Court concluded that:

> . . . [i]t would be anomalous to construe subsection 3622(b)(3) as permitting a grudging use of cost-of-service principles which, by expanding the residuum of costs subject to discretionary allocation, simply preserves the potential treatment that the Act so clearly intended to remedy.

NAGCP I (1976), 569 F.2d at 589.

Petitioners' arguments that the legislative history of the Act does not support the result in *NAGCP I* (1976) are based on a false premise. They equate the Cost Ascertainment System condemned by the Kappel Commission with *NAGCP I's* requirement of reasonable allocation of costs to those classes of mail which cause them. They are not the same. The Cost Ascertainment System was a specific forty-year-old system which apportioned *all* costs to various classes of mail regardless of whether those classes in any sense caused the costs in question.[12] *NAGCP I* (1976) nowhere espouses this practice and indeed repeatedly emphasizes that the Act requires attribution and assignment only of those costs which are the consequences of pro-

[12] Chief Examiner's Initial Decision, *supra* note 3, at 47-48.

viding a particular service. *NAGCP I* (1976), 569 F.2d at 590-93. In *NAGCP III* (1979) only 74.5 percent of all costs were allocated on causation bases.

Furthermore, Congress did not enact the Kappel Commission Report *in toto*. There were substantial differences between the Report and the language of the subsequent legislation; one of the areas of change was the very language at issue here. Thus, the Kappel Commission Report offers little guidance as to the intent of Congress on this point.[13]

Petitioners also argue that *NAGCP I* (1976) must be incorrectly decided because it leaves no room for the eight non-cost rate making factors in § 3622(b). But, as noted by the Postal Service in its brief to the Commission, "*NAGCP I* plainly permits significant residual costs to remain after costs have been attributed and assigned." [14] In *NAGCP III* (1979) that residuum equalled 4.5 billion dollars or 25 percent of Postal Service operating costs. Indeed, it is the inverse elasticity rule which petitioners espouse which effectively eliminates all other factors, allocating costs to those with no option to go elsewhere rather than on the basis of the equities recognized in the other subsections.

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[13] With respect to petitioners' arguments as to the effect of statements of legislators in the House of Representatives in 1976, these contentions were rejected twice by courts below and by the Commission itself (PRC, Vol. 1, 75), and in any event, are without substance as a matter of law. *See, e.g., United States* v. *Wise,* 370 U.S. 405, 411 (1962); *National Citizens Committee for Broadcasting* v. *F.C.C.,* 555 F.2d 938, 952 n.41 (1977).

[14] United States Postal Service Reply Brief to the Postal Rate Commission, R-77-1 (March 17, 1978) at 10.

B. The court's decision did not exceed allowable limits of judicial review

Petitioners argue that the court below did not afford the Commission's interpretation of the Act the deference to which it was entitled and, instead, imposed upon the Commission the court's own selection of an appropriate cost allocation methodology. That is, of course, a reference to *NAGCP I* (1976), not this case. In this case, the Commission methodology was upheld. In any event, while the construction put on a statute by the agency charged with administering it is entitled to deference, the courts are the final authorities on issues of statutory construction. *Zuber* v. *Allen,* 396 U.S. 168, 193 (1969); *F.T.C.* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 385 (1965). Courts are not obliged to stand aside and rubber stamp administrative decisions inconsistent with the plain meaning of a statute or congressional policy underlying it. *N.L.R.B.* v. *Brown,* 380 U.S. 278, 291 (1965); *Hagger Co.* v. *Helvering,* 308 U.S. 289, 398 (1940). *See also Espinoza* v. *Farah Manufacturing Company, Inc.,* 414 U.S. 86, 94 (1973); *Volkswagenwerk Aktienge-Sellschaft* v. *Federal Maritime Commission,* 390 U.S. 261, 272 (1968). To have accepted the Commission's decision in *NAGCP I* (1976) would have been to disregard the clear and unequivocal intent of Congress found in the Act and its legislative history. It was the duty of the court to give full effect to that intent.

Furthermore, the Commission's decision in *NAGCP I* (1976) was based on its interpretation of the Act and did not result from its application of expert knowledge or judgment to a highly technical field. Deference to administrative construction is not overriding where the question does not rest upon technical matters pe-

culiarly within the agency's field of expertise. *Thompson* v. *Clifford,* 308 F.2d 154, 167 (D.C. Cir. 1968); *March* v. *United States,* 506 F.2d 1306, 1316 (D.C. Cir. 1974).

Once the *NAGCP I* (1976) court determined that the Commission's interpretation of the Act was demonstrably wrong, it had no option but to reject the Commission's decision. Having done that, however, both the court and the *NAGCP III* (1979) court have followed this Court's teachings and refrained from imposing any particular cost allocation methodology. The Postal Service itself has observed that the *NAGCP I* (1976) decision "clearly leaves room for proper exercise of judgment and discretion in assigning costs." [15] Indeed, it has argued that the court did not give it *enough* guidance as to appropriate methodologies under the Act.[16]

The decision in *NAGCP I* (1976) requires only a reasoned, nonarbitrary cost methodology designed to produce rates which reflect as closely as possible the costs of providing each class of service.[17] While limita-

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[15] Postal Service Reply Brief to Postal Rate Commission, R77-1 (March 17, 1978) at 6. *See also* Postal Service Brief to Postal Rate Commission, R77-1 (March 7, 1978) at 112-113.

[16] Appellee's Petition for Rehearing at 10-13, *NAGCP I* (1976).

[17] Petitioners attempt to build an argument to the contrary upon that portion of the court's opinion where it distinguishes between attributable and assignable costs, arguing that the court was dictating methodology. But, as indicated by its discussion of this point in NAGCP III (1979), the court was not trying to compel any hard rules on allocating costs between these two categories, but only to make clear that to the extent costs are caused by a classs of mail, the statute requires that they be borne by that class, whether on the basis of attribution or assignment. *NAGCP III* (1979) at 29-31.

tion of cost of service considerations to direct short run volume variability and predominant reliance on the concept of inverse elasticity have been rejected because they do not achieve the result intended by the Act, great discretion remains in the Postal Service and the Commission to devise an appropriate methodology to accomplish the statutory goal. Indeed, the allocation methodologies employed by the Commission in *NAGCP III* (1979) were selected by the Postal Service from numerous alternatives.

CONCLUSION

The principles established in *NAGCP I* (1976) have been applied in a subsequent ratemaking proceeding and reiterated by the court in *NAGCP III* (1979). Petitioners have presented no compelling reason to disturb either of those decisions. The practical effect of granting review will be to upset previously determined rates and fees and needlessly add confusion and uncertainty.

For these reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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